SUPREME COURT, U. S.

FEB 1 1974

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1183

FRED M. WEEMS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AT CINCINNATI

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Tennessee entered in this case on November 5, 1973.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC §1257(3).

QUESTIONS PRESENTED

I.

Whether the exclusion of the names of persons between the ages of 18 and 21 from the jury selection process is violative of the defendant's Fourteenth Amendment right to Due Process.

II.

Whether the returning of inconsistent verdicts against the defendant and his co-defendant under State Law is violative of the defendant's Fourteenth Amendment rights to Due Process.

CONSTITUTIONAL PROVISIONS

1. Constitution of the United States, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. Petitioner respectfully contends the Writ should be granted, as it presents issues important to the right to trial by jury not yet passed upon by the Court, but which will continue to be raised in other cases.

II. The petitioner has not received a proper determination of the issues to the Courts below.

STATEMENT OF THE CASE AND FACTS

Marvin Armstrong, a defense witness, testified that on the afternoon of June 15, 1971 he was stopped on two occasions by the deceased and told to convey a threat and derogatory remarks to the petitioner, Fred Weems. Mr. Armstrong testified that upon seeing the petitioner later in the day he did relate to him the deceased's remarks. The petitioner, Fred Weems, testified that this and other threats made by Lonnie Booker, the deceased, had found their way to him and scared him considerably. The petitioner, Fred Weems, testified that due to his fear of the deceased, he asked his son to be on the lookout for the deceased that evening and to alert him if he appeared in the area.

Officer Terry Self, radio operator with the Tennessee Highway Patrol, then testified that at 7:30 P.M. on June 15, 1971, he received a telephone call from petitioner Fred Weems. Mr. Self testified that Fred Weems said that the deceased, Lonnie Booker, was in the vicinity and that an officer should come out and see, and if Booker came around him he would kill him. Acting upon this conversation, Officer Self dispatched Deputy Sheriff Brown to the area

where the deceased, Booker, was parked drinking beer with his friend, John W. McClaine. Sheriff Brown engaged the deceased in conversation and asked him to stay out of the Baileytown area that night so as to avoid trouble. After cruising in the area the deceased and McClaine left and returned to McClaine's house and drank a few more beers. Shortly thereafter, the deceased left.

Mrs. Charlotte Jones testified that at about 10:00 P.M. the deceased entered her store and began to make accusations and curse at Mrs. Fred Weems and her son, J. D. Weems, who were present in the store. Mrs. Jones testified that the deceased picked up a chair and threatened to hit Mrs. Weems with it, but that he never actually struck her. During this altercation, J. D. Weems left and returned to his father's package store. State witness, Billy Spears, testified that at about 10:15 P.M., J. D. Weems came into the package store where he and petitioner, Fred Weems, were working and told his father to get his gun because "he" was down at the store and had slapped his mother. According to the testimony of J. D. Weems and Fred Weems, Mr. Weems did nothing for a few moments and then after contemplating his course of action, picked up a rifle and left the store saying he would have to go talk with "him." J. D. Weems and Fred Weems testified that after leaving the package store they pursued the deceased's automobile with the sole purpose of overtaking him and discussing their differences. Mr. Fred Weems admitted to shooting at the deceased's automobile while pursuing him, but maintained that his only purpose was to shoot out the tires or gas tank on deceased's automobile to bring him to a halt. After pursuing the deceased four to six miles and firing numerous shots, the deceased's car ran off the road and came to a halt. Afraid of being tricked, J. D. Weems and Fred Weems proceeded around the Booker car and returned home without ever stopping.

Officer Self testified that later in the evening of June 15, 1971, at about 10:45 P.M. the petitioner Fred Weems telephoned him again and told him that he had shot Lonnie Booker just as he had earlier warned that he would. Acting upon this information, Officer Self dispatched Sheriff Brown to Fred Weems' home where he was taken into custody.

On December 4, 1971, prior to the selection of the jurors in this case, defense counsel filed a motion challenging the array on the ground that the jury box, from which the prospective jurors for this case were drawn, was refilled on August 30, 1971, and contained the names of no persons between the ages of 18 and 21 who were eligible to serve as jurors.

On December 7, 1971, defense counsel presented the testimony of one of the Greene County jury commissioners and the secretary to the commissioners to support its challenge to the array. After direct examination by defense counsel and the Court and cross-examination of these witnesses by the Prosecutor, and before the jury was sworn, the defense renewed its motion challenging the array.

The petitioner was acquitted on charges of first and second degree murder and convicted of voluntary manslaughter. The co-defendant, petitioner's son, was convicted of involuntary manslaughter.

Appeal was perfected to the Court of Criminal Appeals sitting at Knoxville, Tennessee and the Tennessee Supreme Court which both held that no error had occurred.

Petitioner is now properly before this Court by this Petition.

ARGUMENT

I.

Whether the Exclusion of the Names of Persons Between the Ages of 18 and 21 from the Jury Selection Process Is Violative of the Petitioner's Fourteenth Amendment Right to Due Process.

The petitioner submits that the exclusion of the names of those persons between the ages of 18 and 21 from the jury box from which the defendant's jury was chosen constitutes a denial of his right to due process of law under the Fourteenth Amendment.

Long before *Duncan* v. *Louisiana*, 391 U.S. 145 (1968) imposed the requirement of jury trial on the states under the Fourteenth Amendment, the United States Supreme Court recognized that due process and the established traditions in the use of juries as instruments of public justice require that the jury be a body truly representative of the community. *Smith* v. *Texas*, 311 U.S. 128 at 130 (1970). Trial by jury means a jury composed of the peers or equals of the person whose rights it is selected or summoned to determine. *Strauder* v. *West Virginia*, 100 U.S. 303 (1879). The Tennesse Legislature has broadened the dimensions of Tennessee's adult community by lowering the age of majority to 18. T.C.A. §1-313. As members of the adult community, persons in this age group acquired rights and incurred responsibilities equivalent to those already held by persons over 21, including the right to qualify as a juror. T.C.A. §22-101. As adults, persons in this 18 to 21 age group became the legal equals and peers of persons over 21 years of age and as such could not be excluded from sitting as jurors in the trials of persons as adults.

While the United States Supreme Court has required a showing of systematic exclusion of identifiable groups of society, it has also recognized a positive, affirmative duty on the part of the jury commissioners and other state officials. *Norris* v. *Alabama*, 294 U.S. 587 (1935); *Cassell* v. *Texas*, 339 U.S. 282 (1950). The object of the Constitutional mandate is to produce master jury panels from which identifiable community classes have not been systematically excluded. *Norris* v. *Alabama, supra.* Chief Justice Vinson stated in *Avery* v. *Georgia*, 345 U.S. 559 (1953) that, "The jury commissioner and the officials responsible for the selection of the panel were under a constitutional duty to follow a procedure—a course of conduct—which would not operate to discriminate in the selection of the jurors on social grounds. If they failed in that duty, then this conviction must be reversed—no matter how strong the evidence of petitioner's guilt."

The petitioner submits that the jury commissioner breached his affirmative duty not to exclude any group qualified to serve on jury service. The fact that the petitioner did not belong to the excluded group does not carry any relevance, for the rule as announced in *Peters* v. *Kiff*, 407 U.S. 493 (1972) recognizes the standing of a defendant to challenge discriminatory exclusion of a class or group of persons even though the defendant is not a member of the excluded class. Actual prejudice to the petitioner need not be shown either, for when any large, identifiable segment of the community is excluded from jury service, the effect is to remove from the jury some qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. *Peters, ibid.*

II.

Whether the Returning of Inconsistent Verdicts Against the Petitioner and His Co-Defendant under State Law Is Violative of the Petitioner's Fourteenth Amendment Rights to Due Process.

The petitioner submits that the jury returning an inconsistent verdict against him and the co-defendant in contravention of state law is violative of his right to due process under the Fourteenth Amendment. The United States Supreme Court has recognized that the Due Process clause will serve to protect a defendant against ". . . conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358 at 364 (1970). It is the petitioner's contention that there was not such proof because Tennessee law would require consistent verdicts against the petitioner and the co-defendant. Inconsistent verdicts by a jury in such a situation precludes a presumption that all facts were proved beyond a reasonable doubt.

It is well settled in Tennessee that to warrant a conviction, the Prosecutor must prove the essential elements of the crime with which the accused is charged. *Smithson* v. *State*, 222 Tenn. 499, 438 SW2d 61 (1969). The co-defendant could not be convicted of involuntary manslaughter since the death or bodily injury must be caused by the unlawful act or lawful act done in an unlawful manner. Clearly an element of the law on involuntary manslaughter is that it requires the defendant actually perform the act which results in the unlawful killing. T.C.A. §39-2409. The petitioner submits that since the element was not proven the co-defendant was aider and abettor to the principal, the petitioner. T.C.A. §39-109;

Morris v. *State*, ... Tenn. ....., 456 SW2d 840 (1970); *Eager* v. *State*, 205 Tenn. 156, 325 SW2d 815 (1959). Under the statute the aider and abettor is not only to be indicted and charged as the principal is, but the statute clearly requires the same punishment for both. T.C.A. §39-109 has been consistently applied such that in every conviction under it the degree of the principal's guilt has been the same as the aider and abettor's. *Watson* v. *State*, 184 Tenn. 177, 197 SW2d 802 (1946); *Turner* v. *State*, 187 Tenn. 309, 213 SW2d 281 (1948); *Bryson* v. *State*, 195 Tenn. 313, 259 SW2d 535 (1953); *Beck* v. *State*, 203 Tenn. 671, 315 SW2d 254 (1958); *Stollard* v. *State*, 209 Tenn. 13, 348 SW2d 489 (1961); *Essary* v. *State*, 210 Tenn. 220, 357 SW2d 342 (1962); *Flippen* v. *State*, 211 Tenn. 507, 365 SW2d 895 (1963); *Estes* v. *State*, 214 Tenn. 484, 381 SW2d 283 (1964); *Nelson* v. *State*, 219 Tenn. 680, 413 SW2d 358 (1967); *Maxwell* v. *State*, ... Tenn. ....., 441 SW2d 503 (1969). The sole exception to this long line of cases is a forty-five year old case. *Presley* v. *State*, 161 Tenn. 310, 30 SW2d 231 (1930).

The petitioner submits that he was denied a right fundamental to a fair trial by the jury's failure to return consistent verdicts as against him and the co-defendant. *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). Inconsistent verdicts, when consistent verdicts were required, makes clear that the jury was not presented proof beyond a reasonable doubt as to the facts necessary to constitute the petitioner's conviction for voluntary manslaughter. *In re Winship, supra.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DALE QUILLEN
Attorney for Petitioner Fred M. Weems

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari have been forwarded to the Honorable David M. Pack, Tennessee State Attorney General, Supreme Court Building, Nashville, Tennessee 37219 this 30th day of January, 1974.

DALE QUILLEN
Attorney for Petitioner

APPENDIX

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

KNOXVILLE, JUNE, 1973

No. 74

Greene County
Hon. H. C. Smith, Judge
(Voluntary Manslaughter)

FRED WEEMS,
Plaintiff-in-Error

v.

STATE OF TENNESSEE,
Defendant-in-Error

For the Plaintiff-in-Error:

Trial:

John A. Armstrong and
Fred Hartman
Greenville, Tennessee

Appeal:

Dale Quillen
Nashville, Tennessee

For the Defendant-in-Error:

David M. Pack
Attorney General of Tennessee
William C. Koch, Jr.
Assistant Attorney General
Heiskell H. Winstead
District Attorney General

Opinion Filed: September 17, 1973

AFFIRMED
WILLIAM S. RUSSELL,
Judge

OPINION

Fred Weems appeals his conviction for voluntary manslaughter in the killing of one Lonnie Booker, his punishment having been fixed at not less than two (2) nor more than three (3) years in the penitentiary.

Only two questions are presented by the errors assigned. It is first contended that the evidence does not support the conviction. We hold to the contrary. Weems was involved in a dispute with Booker that caused Weems to telephone the Sheriff's office to seek help in keeping Booker away. A deputy encountered Booker and requested that he stay away from Weems, and elicited Booker's promise to do so. However, Booker encountered Weems' son and wife at a store, accused the youth of "calling the law" on him, and hard words and threats of physical violence were said to Mrs. Weems. Young Weems fled the scene, got his father (the defendant), and returned to the area in young Weems' car. The defendant had armed himself with a lever-action high-powered deer rifle, and the son procured a .38 calibre pistol. Booker's car was spotted and pursued, and in a chase that traversed several miles the defendant repeatedly fired the rifle into Booker's car. The fatal bullet hit the victim in the head, whereupon, Booker's car ran off the road. Weems did not stop, "fearing a trap". He testified that he had not intended to kill Booker, but shot at his car to stop him so that he could talk with him. Weems did report the shooting to authorities.

The learned trial judge, in overruling the motion for a new trial, made it quite clear that he felt that a higher degree of homicide was made out by the proof. Apparently the jury felt that word of the altercation between Booker and Mrs. Weems had so incensed Weems that the

killing was done in the sudden heat of passion, provoked by the assault (or threats thereof) upon his wife; and that this negated premeditation and malice.

There is no question but that Weems shot Booker to death, that the killing was by no means in self-defense, and that the overwhelming weight of the evidence negates the defense theory of an accident. The first assignment of error is overruled.

The other assignment of error has its roots in the fact that 18-20 year olds were made eligible for jury duty as of May 11, 1971 (see T.C.A. §1-313). On the day that the trial commenced (December 4, 1972) defense counsel challenged the array of prospective jurors on the theory that that 18-20 year-olds had been excluded therefrom. The record reflects only that the only one of the three jury commissioners who was called as a witness was not aware that when the jury box was last filled (on August 30, 1971) 18-20 year-olds were then eligible to serve. He did not know the ages of the people whose names were put in the box, and stated that no attempt was made to exclude any group. No evidence was introduced to show the ages of the veniremen, or the source or sources from which the names were taken. No evidence of the number of 18-20 year-olds in Greene County (or even that there were any) was introduced.

In order to establish a constitutional violation in the jury selection process the defendant must first prove that the group of persons allegedly excluded constitutes a distinct and separate class in the population of the county; and if such a class is shown, then the defendant has the further burden of proving that members of this class were purposefully and systematically excluded from jury service. *Shadden* v. *State*, ... Tenn.Crim.App. ....., 488

SW2d 54. This record will not support the identification or the purposeful and systematic exclusion of a class.

Affirmed.

/s/ William S. Russell
William S. Russell, Judge

Concur:

/s/ W. Wayne Oliver
W. Wayne Oliver, Judge

/s/ Robert K. Dwyer
Robert K. Dwyer, Judge

— Office of —
CLERK OF SUPREME COURT
State of Tennessee

P. O. Box 444
Knoxville, Tenn. 37901
Tel. 525-5171

NOV 5 1973

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Dear Sir:

In the cause of Fred Weems vs.
The State the Supreme Court today
the judgment of the Lower Court
WRIT DENIED

RECEIVED 11-9-73

Yours truly,

JOHN A. PARKER, Clerk

Under custom of Tennessee, a formal Order is not furnished to defendant, but the above post card serves as Notice.